

Message

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Sent: 4/25/2017 7:23:25 PM
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Subject: FW: Favorable Ninth Circuit Opinion Dismissing Challenge to EPA Objection Letter for California Draft NPDES Permits
Attachments: ENV_DEFENSE-#802965-v1-DN_54-1_FILED_OPINION_(KIM_MCLANE_WARDLAW__JAY_S__BYBEE_and_ROBERT_HOLMES_BELL)_DISMISSED__Judge__JSB_Author

All, FYI, here is the OGC summary of that decision I mentioned 2 weeks ago in which the CA9 held that an EPA objection letter is not judicially reviewable final agency action when issued

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Subject: Favorable Ninth Circuit Opinion Dismissing Challenge to EPA Objection Letter for California Draft NPDES Permits

Opinion and Background

On April 12, 2017, the U.S. Court of Appeals for the Ninth Circuit issued the attached opinion dismissing a challenge to an EPA Region 9 objection letter for two draft California National Pollution Discharge Elimination System (NPDES) permits. The court dismissed on grounds that it lacked subject matter jurisdiction. *Southern California Alliance of Publicly Owned Treatment Works (SCAP) v. EPA*, No. 14-74047 (9th Cir.).

EPA Region 9 issued a formal objection letter following its review of two draft NPDES permits developed by the Los Angeles Regional Board (LA Board) of California. The permits were for two publicly owned treatment works. EPA issued its objection primarily because the permits failed to include an effluent limitation for whole effluent toxicity, despite the LA Board's determination that the discharges could cause or contribute to chronic toxicity. Following EPA's objection, the LA Board revised the draft permits to meet the terms of EPA's objection letter. The LA Board issued the final permits in November 2014.

SCAP filed its petition in the Ninth Circuit seeking review of EPA's objection letter. SCAP alleged that the court of appeals had jurisdiction to review EPA's objection letter pursuant to Clean Water Act (CWA) sections 509(b)(1)(E) and (F). The court held that neither provision gives the court jurisdiction to review EPA's objection letter. The court explained that when a state assumes responsibility for administering the NPDES program, the state becomes the permit-issuing agency. An EPA objection to a draft permit is merely an interim step in the state permitting process. The permitting decision remains with the state whether to revise the draft permit to address EPA's objection or not to remedy the objection and let permitting authority pass back to EPA. If the state chooses to revise and issue the final permit, review

of the permit would be in state court. If the state relinquishes jurisdiction to EPA to issue the permit, EPA's final action in issuing or denying the permit would be subject to review in federal court. Opinion at 11 -12.

The Ninth Circuit addressed in detail its lack of jurisdiction under sections 509(b)(1)(E) and (F). Regarding section 509(b)(1)(E)(which provides for federal appellate review of EPA action "in approving or promulgating any effluent limitation or other limitation" under section 301, 302, 306 or 405), the court noted that the Ninth Circuit had previously rejected the argument that SCAP was making. In that prior case, the Ninth Circuit held that section 509(b)(1)(E) does not provide jurisdiction over a challenge to an EPA objection to an NPDES permit. Opinion at 12-17. The court also rejected SCAP's arguments based on the Eighth Circuit's decision in *Iowa League of Cities. Id.* at 14-17. Regarding section 509(b)(1)(F)(which provides for review of EPA action "issuing or denying any permit" under section 402), the court found that EPA's objection was part of an ongoing process and was not the denial of a permit. Opinion at 17-22.

What this Opinion Means

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Next Steps

SCAP has 45 days to file a petition for rehearing by the panel or with the Ninth Circuit *en banc*.

If you have any questions regarding the court's opinion, please contact Pooja Parikh at 202-564-0839 in the Water Law Office or Marcela von Vacano in the Office of Regional Counsel at 415-927-3905.

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